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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-1034

BETTY N. EMBRY,
Petitioner,

vs.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,
Respondent.

REPLY TO BRIEF IN OPPOSITION

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Respondent Equitable attempts to by-pass the full faith and credit issue implicit in this case by presenting the same fallacious argument it made below. Equitable asserts that the "conditions for recovery under the statutory Workmen's Compensation Act and under the insurance contracts are different and involve separate and distinct issues" so that collateral estoppel does not apply. (Brief, p. 6). It is contended that the insurance policy provisions which deny benefits for accidental death if illness or disease causes death make the issues "different".

The fallacy inherent in this line of reasoning is readily apparent. For Kansas law unquestionably requires benefits to be paid under such provisions if an accident in fact aggravates an existing, dormant disease, resulting in death. The accidental aggravation of Embry's arteriosclerosis was a fact issue finally determined by the state court judgment.

This fact issue was the same as that again raised in this action. It was no longer open to relitigation. It follows that the federal district court is required to give full faith and credit to that judgment.

The only issue in this action which was not directly determined in the state court action was whether Embry's disease was "dormant". Yet Equitable, and the lower courts, say that the presence of this additional issue makes all issues in the two actions "different". This assertion deprives the doctrine of collateral estoppel of all vitality. For if separate elements making up a cause of action must all be determined in the prior suit before the prior judgment is binding in regard to any fact determination, the result is equivalent to holding that the causes of action must be identical in both cases before the prior judgment is binding. This result, then, gives no broader scope to the doctrine of collateral estoppel than the traditional doctrine of res judicata, wherein causes of action must be the same. For a court to say it is applying the doctrine of collateral estoppel, and then to apply it so restrictively as to permit the relitigation of a major fact issue already determined, is clearly a denial of full faith and credit.

The foregoing demonstrates that the full faith and credit issue raised in our petition is implicit in this case, and that the narrow and unrealistic concept of collateral estoppel as applied by the Court of Appeals constitutes a direct denial of full faith and credit required by 28 U.S.C. § 1738. Equitable has presented no valid answer to Kansas law making any prior fact determination final and binding in any future action between the parties. The factual determination that Embry's accident aggravated his disease and caused his death was therefore a final adjudication not subject to relitigation in this case.

Equitable makes several inaccurate statements in its Brief in Opposition. Equitable repeatedly asserts that

petitioner contends for the first time in this Court that Kansas law treats arteriosclerosis as "dormant". (Brief, pp. 2, 4, 7, 10). The truth is that this position was taken by petitioner from the beginning of this action. It was raised in the district court by motion for summary judgment prior to trial, and by motion for judgment at the end of the evidence. (R: 50, 318). Petitioner was not required again to ask instructions which would have required a verdict in her favor or to otherwise take formal exception to the overruling of her motions. *Mitzner* v. *Baylies*, 424 F.2d 814, 816 (D.C. Cir.). In the addendum to this Reply are reproduced excerpts from petitioner's brief, reply brief, and petition for rehearing filed with the Court of Appeals, all taking the same position. The clear statement of Kansas law in *Williams*, ignored by respondent and by the Court of Appeals, is that arterial disease is "dormant". If an accident aggravates the disease, resulting in death, liability is established.

The questions presented in our petition for certiorari are clearly raised by the decision of the Court of Appeals, and should be resolved for the reasons stated therein.

Respectfully submitted,

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